Nos. 16-1424; 16-1435; 16-1474; 16-1482

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PENOBSCOT NATION; UNITED STATES, on its own behalf, and for the benefit of the Penobscot Nation,

Plaintiffs-Appellants/Cross-Appellees,

v.

AARON M. FREY, Attorney General for the State of Maine; JUDY A. CAMUSO, Commissioner for the Maine Department of Inland Fisheries and Wildlife; JOEL T. WILKINSON, Colonel for the Maine Warden Service; STATE OF MAINE; TOWN OF HOWLAND; TRUE TEXTILES, INC.; GUILFORD-SANGERVILLE SANITARY DISTRICT; CITY OF BREWER; TOWN OF MILLINOCKET; KRUGER ENERGY (USA) INC.; VEAZIE SEWER DISTRICT; TOWN OF MATTAWAMKEAG; COVANTA MAINE LLC; LINCOLN SANITARY DISTRICT; TOWN OF EAST MILLINOCKET; TOWN OF LINCOLN; VERSO PAPER CORPORATION,

Defendants-Appellees/Cross-Appellants,

EXPERA OLD TOWN; TOWN OF BUCKSPORT; LINCOLN PAPER AND TISSUE LLC; GREAT NORTHERN PAPER COMPANY LLC,

Defendants-Appellees,

TOWN OF ORONO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

REPLY OF THE UNITED STATES IN SUPPORT OF PETITION FOR REHEARING EN BANC

[*continued on next page*]

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INTRODUCTION

The State of Maine's Response to the petitions for rehearing *en banc* fails to undercut the petitions' demonstration that rehearing is warranted. The panel's June 30, 2017 decision incorrectly deprives the Penobscot Nation of the submerged lands in the Main Stem of the Penobscot River and the associated rights to riverine resources—the heart of the Penobscot homeland and culture. That riverbed and those resources were reserved from cession in the Nation's 1796 and 1818 treaties with Massachusetts, and they were confirmed as part of the Penobscot Reservation by the Settlement Acts in 1980. And Maine itself understood that the Penobscot Reservation included the waters and riverbed surrounding the islands in the Main Stem before abruptly changing position in 2012.

As Judge Torruella persuasively explained in his dissenting opinion, the panel majority failed to follow fundamental principles of statutory interpretation. It placed undue reliance on dictionary definitions of "island" that merely describe the geographic concept of an island and do not address the legal boundary of an island parcel, which is the relevant issue for resolving this case. The majority also failed to consider historical context, negotiation history, statutory purpose, and background principles of common law, and it created a wholly unnecessary conflict with the Settlement Acts' guarantee of an on-reservation sustenance fishing right. This Court should grant rehearing *en banc* and hold, as Judge

Torruella concluded, that the Penobscot Reservation includes the waters and riverbed surrounding the islands in the Main Stem of the Penobscot River. The United States endorses the Penobscot Nation's arguments in its Reply Brief.

ARGUMENT

I. The Majority's Fundamental Errors in Failing to Properly Apply Both the Ordinary Rules of Statutory Construction and the Indian Canon of Construction Warrant *En Banc* Review.

A. The Settlement Acts' definitions of "Penobscot Indian Reservation" do not unambiguously restrict the Reservation to the uplands of the islands.

The Maine Indian Claims Settlement Act ("MICSA"), Pub. L. No. 96-420, 94 Stat. 1785 (1980) (formerly codified at 25 U.S.C. §§ 1721-1735), defines the Penobscot Reservation as "those lands as defined in the Maine Implementing Act." MICSA § 1722(i). The Maine Implementing Act ("MIA"), 30 M.R.S.A. §§ 6201-6214, defines the Reservation to include

> the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine consisting solely of Indian Island, also known as Old Town Island, and all islands in that river northward thereof that existed on June 29, 1818, excepting any island transferred to a person or entity other than a member of the Penobscot Nation subsequent to June 29, 1818, and prior to the effective date of this Act.

MIA § 6203(8). Based on dictionary definitions of the word "island," the phrase "islands in the Penobscot River," and the word "solely," the majority concluded (Op. 10-12) that § 6203(8) unambiguously restricts the Penobscot Reservation to

the uplands of the islands and excludes the surrounding submerged land and riverine resources. The majority improperly truncated its statutory analysis by erroneously characterizing MIA's definition as unambiguous.

Judge Torruella persuasively showed the majority's characterization to be overly simplistic. He properly cautioned against too readily characterizing "[e]ven seemingly straightforward text" as unambiguous, Op. 32 (quoting *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 192 (1st Cir. 1999)), including by relying on the dictionary definition of a single statutory phrase, *id*. (citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115-16 (1949)). Most fundamentally, the dictionary definitions on which the majority relied (Op. 10-11) describe the *geographic* concept of an island—a piece of land that is completely surrounded by water and smaller than a continent—but they do not specify the *legal* boundary of an island parcel. Addressing the latter is required for proper resolution of this suit.

As Judge Torruella noted (Op. 50 n.27), the "majority never specifies at what water level the boundaries of the Penobscot Indian Reservation are to be determined." Indeed, the majority appears to hold the unusual view "that the Penobscot Indian Reservation shrinks when the water levels in the River rise, and then expands when those levels fall." *Id*. If the reservation is instead a fixed area, background legal principles must be considered to determine the boundary (i.e., the ordinary high-water line, the ordinary low-water line, the thread of the river, the

riverbanks, or some other line). Under Maine common law, an island parcel presumptively includes the riverbed to the thread of the channels. *See* U.S. Principal Brief 27-28.

Judge Torruella next explained (Op. 46-47 n.26) that the phrase "islands in the Penobscot River" does not necessarily separate uplands from submerged lands but may reasonably be read "to situate the Reservation" and to exclude islands in other rivers. He similarly explained (*id.*) that the word "solely" "serves to specify which islands in the Penobscot River are included in the Reservation, and which are not," not to separate uplands from submerged lands. *See* U.S. Principal Brief 28-29.

Maine endorses the majority's "unambiguous" characterization (Response 3-4), but it responds to none of Judge Torruella's points. A more thorough statutory analysis is required to determine the Reservation boundaries—one that "looks not to a dictionary, but rather places the statute in its context, and looks to Congressional intent." Op. 46. Proper statutory analysis leads to the conclusion reached by Judge Torruella.

B. The majority did not construe the Settlement Acts as a whole.

Maine next argues (Response 4-5) that the majority, after reaching the preliminary conclusion that MIA § 6203(8) unambiguously excludes submerged land and its associated resources, then tested that interpretation by considering

other provisions of the Settlement Acts. In fact, the majority conducted no such test. To "test" whether its "islands means uplands" interpretation is truly the only reasonable reading, the majority had to consider not only whether other provisions were consistent with its interpretation, but also whether other provisions were consistent with the alternative interpretation—based on the treaties and common-law principles—that these islands in a nontidal river encompass the surrounding submerged land and its associated riverine resources. Yet the majority considered only whether other provisions could be read to support its own interpretation.

First, Maine points (Response 5) to the absence in MIA § 6203(8) of certain words—"water," "water rights," "natural resources," and "submerged lands"—found in other statutory provisions. But Maine fails to recognize that the absence of these words is consistent with the alternative interpretation because those words are encompassed by the word "islands." Therefore, the absence of those words in § 6203(8) does not support the majority's interpretation over the alternative.

Second, MIA § 6205(3)(A)—providing that "[f]or purposes of this section, land along and adjacent to the Penobscot River shall be deemed to be contiguous to the Penobscot Indian Reservation"—similarly does not support the majority's interpretation over the alternative interpretation. As explained in our Response/Reply Brief (at 32) and in Judge Torruella's dissenting opinion (at 53 n.28), this provision "serves the purpose of rendering land along and adjacent to

any part of the Penobscot River (including south of the Reservation) contiguous to the Reservation." Identifying no flaw in this explanation, the majority and Maine simply ignore it. *See* Response 6.

Third, and most significantly, Maine endorses (Response 6-7) the majority's treatment of MIA § 6207(4), the provision guaranteeing the Penobscot Nation's *on-reservation* sustenance fishing right. If the Nation's Reservation includes no waters in which they may fish, the Penobscots are at the mercy of the State's discretion—directly contrary to the intent of the Settlement Acts to confirm their legal right to fish in the Penobscot River. The majority could not take the position that this critical provision *supports* its uplands-only interpretation of § 6203(8); rather, it could argue only that this provision is somehow not *fatally incompatible with* that interpretation. In contrast, the on-reservation sustenance fishing guarantee provides strong support for the alternative interpretation of § 6203(8) that the Penobscot Reservation *includes* riverbed above which the Penobscot may fish. On this critical point, Maine offers only a brief summary of the majority's position (Response 6-7) but makes no effort to counter Judge Torruella's critique (Op. 60-64) persuasively debunking it.

Judge Torruella rejected (Op. 64) the majority's effort to resolve the asserted tension between § 6203(8) and § 6207(4) through "the boilerplate phrase"—i.e., "unless the context indicates otherwise"—found in the introductory sentence to

MIA's definitions provision (§ 6203): the "majority never explains in what way the 'context indicates otherwise,' " and it "is only through the majority's forced reading of the definition of the Nation's Reservation that a tension is even created between that definition and the sustenance fishing provision." Maine reiterates (Response 6-7) the majority's belittling characterization of the critical on-reservation sustenance fishing provision as a "mousehole." *See* Op. 16 (quoting the Supreme Court's statement in *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001), that legislatures do not "hide elephants in mouseholes"). But the "mousehole" here is the boilerplate phrase "unless the context indicates otherwise" on which the majority relied, not the express provision of the on-reservation sustenance fishing guarantee. Maine offers nothing to allay Judge Torruella's incredulity (Op. 34) "that the Nation, negotiating the Settlement Agreements from a position of strength—having just established before this court that it had a claim to approximately two-thirds of Maine, *see, e.g., Joint Passamaquoddy Tribal Council v. Morton*, 528 F.2d 370, 370 (1st Cir. 1975)—ceded the Penobscot River that it has fished since time immemorial and values so greatly."[1]

[1] Maine does not address the argument (U.S. Petition 11-12) that the majority also erred in vacating the district court's holding that the Penobscot Reservation includes the Penobscot River bank to bank for purposes of MIA § 6207(4) on the asserted ground that the scope of the sustenance fishing provision was not ripe (Op. 23-29).

C. The majority erred in failing to interpret MIA § 6203(8) against the backdrop of the common law.

The majority firmly rejected (Op. 19 n.10) any consideration of "state common law," which it contrasted with "normal canons of statutory construction." But analyzing a statute within the framework of existing law, including common law, is *part of the ordinary process of statutory construction*. *See* 2B Sutherland *Statutes and Statutory Construction* § 50.1 (Nov. 2018) ("All legislation is interpreted in the light of the common law and the scheme of jurisprudence existing at the time of its enactment."). This Court has previously acknowledged that "courts have long presumed that Congress acts against the background of prior law." *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (1st Cir. 1997) (citing *Clarke v. Securities Industries Ass'n*, 479 U.S. 388, 405 (1987); *Kolster v. INS*, 101 F.3d 785, 787-88 (1st Cir. 1996)); *accord Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir. 1999). Nor can the majority avoid this important element of statutory construction with the suggestion (Op. 19 n.10) that the common-law principles governing riverbed ownership are relevant only "for the construction of deeds." As we explained in our Principal Brief (at 42), these common-law principles are relevant in many contexts, including in determining political boundaries, as here.

Judge Torruella properly considered relevant common-law principles in his analysis of the Settlement Acts. Indeed, as he noted, Maine itself had previously acknowledged to this Court that the Penobscot Reservation includes the islands

"and the usual accompanying riparian rights" (which are common-law rights). Op. 42 (quoting Maine's brief in *Maine v. Johnson*, 1st Cir. Nos. 04-1363, 04-1375); *see also* Op. 57 (pointing out Maine's statement in the same brief that determining the reservation boundary requires analysis of the treaties and "aspects of Maine property law"). Judge Torruella correctly explained, consistent with Maine's own prior position, that both the text and the legislative history of the Settlement Acts make clear that the Penobscot Nation and Passamaquoddy Tribe "would retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts." Op. 51 (quoting the Senate and House reports). He correctly concluded that the treaties are properly construed to reserve to the Penobscot Nation the riverbed and associated riverine resources bank to bank, a conclusion that is supported by both Massachusetts common law and the Penobscots' understanding. Op. 54-57.

Maine's only comment on this fundamental point of disagreement between the majority and Judge Torruella is that there is no need here to "resort to" common law principles because the statutory language is unambiguous. Response 8 (citing *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 793 (1st Cir. 1996)). But Maine errs in two respects. First, as just explained, the ordinary tools of statutory construction include consideration of the backdrop of existing law. We are aware of no rule requiring that preference be given to dictionary definitions

(particularly definitions that *do not* fully address the question to be decided) over the backdrop of existing law (particularly when it *does* fully address the question to be decided). *Passamaquoddy Tribe* addressed a different issue, namely, the Indian canon of construction. Second, while it is possible that a statute could define a boundary with sufficient clarity and precision that there would be no need to "resort to" background legal principles, MIA § 6203(8) does not provide within its four corners all of the information required to draw a map of the Penobscot Reservation.

D. The majority erred in failing to apply the Indian canon of construction.

For the foregoing reasons, the majority's interpretation of the Settlement Acts is unreasonable. But even if that interpretation were reasonable, it should be rejected based on the longstanding Indian canon of construction recently reaffirmed by the Supreme Court. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," and the words of a treaty must be construed "in the sense in which they would naturally be understood by the Indians." *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (internal quotation marks omitted).

Maine endorses (Response 7-8) the majority's refusal to apply the Indian canon of construction on the asserted ground that the Settlement Acts unambiguously exclude the riverbed and its associated resources, a

characterization that Judge Torruella persuasively rejected. Moreover as Judge Torruella pointed out based on *Jones v. Meehan*, 175 U.S. 1, 11 (1899), and subsequent Supreme Court precedent, "treaties must ... be construed ... in the sense in which they would naturally be understood by the Indians" without regard to whether the words may be considered unambiguous by others. Op. 33-34 (internal quotation marks omitted). This interpretive rule applies to the Settlement Acts because they are the agreement by which the Penobscot Nation settled its land claims and agreed to cede its aboriginal title except with regard to its retained Reservation. It cannot reasonably be disputed that the Penobscots understood that they reserved their rights to the critical resources in the Penobscot River in their treaties and that they successfully bargained to retain them in the Settlement Acts. *See* Op. 34.[2]

Maine then reasserts (Response 8-9) its argument that MICSA §§ 1725(h) and 1735(b) bar courts from applying the Indian canon of construction when interpreting its provisions, an argument the majority declined to decide (Op. 10 n.4). The United States explained in its Response/Reply Brief (at 4) that Maine

[2] Maine questions (Response 8-9 n.5) the relevance of the clear-statement rule for reservation diminishment. *See* U.S. Petition 16-17. Maine had long recognized as the Penobscot Reservation the area that the Nation reserved in the treaties. *See* MIA § 6202 (referring to the "present" Penobscot Reservation). Congress in MICSA intended to confirm that Reservation and to extinguish aboriginal title only outside of its boundaries.

based this argument on a misinterpretation of the Senate Report. Section 1725(h) is most reasonably interpreted to address the jurisdictional arrangements within the Passamaquoddy and Penobscot Territories (which include the Reservations), not the process of interpreting the Settlement Acts to determine boundaries or otherwise. Section 1735(b) obviously has no bearing on the issue because it addresses only federal laws "enacted after October 10, 1980." Maine now suggests (Response 9) that, "[b]ecause of these provisions," this Court declined to apply the Indian canon to interpret the Settlement Acts in *Akins*, 130 F.3d at 488, and *Fellencer*, 164 F.3d at 710-11. That is incorrect. The Court discussed §§ 1725(h) and 1735(b) in those cases for completely different purposes. Finally, this Court expressly acknowledged the Indian canon in *Fellencer*. 164 F.3d at 709.

In sum, the panel majority's errors warrant *en banc* review.

II. The Majority's Analysis Impermissibly Deviates from the Supreme Court's Approach in *Alaska Pacific Fisheries v. United States* and Disregards this Court's Understanding in *Maine v. Johnson* that the Penobscot Reservation Includes Some Part of the River.

A. *Alaska Pacific Fisheries*

Judge Torruella carefully and thoroughly explained (Op. 43-50) how the Supreme Court's approach to determining the boundaries of the Metlakahtla Reservation in Alaska must be followed in this case, and that such an approach necessarily leads to the conclusion that the Penobscot Reservation includes the waters and submerged lands surrounding the islands in the Penobscot River. In

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), the Supreme Court held that Congress's 1891 reservation for the Metlakahtla Indians of "the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska" included the surrounding waters and submerged land. The Court rejected the argument that Congress intended to reserve only the uplands of the islands, reasoning that Congress knew that the Metlakahtlas were "largely fishermen and hunters" who "looked upon the islands as a suitable location" because "the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development." *Id*. at 88. The Court concluded that "Congress intended to conform its actions to their situations and needs." *Id*. at 89.

Maine argues (Response 10-11) that the majority correctly rejected the relevance of *Alaska Pacific Fisheries* (Op. 17-21), but Maine's discussion of the case distorts the Supreme Court's analytical approach. Maine suggests (Response 10) that the decision turned on its application of the Indian canon of construction, which assertedly applied because the reservation was ambiguously defined "as a region." To the contrary, the Court concluded that Congress meant "the geographical name"—"the body of lands known as Annette Islands"— to "embrac[e] the intervening and surrounding waters as well as the upland" based on its intent to establish a reservation that would "conform" to the Metlakahtlas'

"situation and needs." 248 U.S. at 89. Only after reaching this conclusion did the Court find additional support for it in the Indian canon, as well as in the understanding of the Metlakahtlas, the public, and the Secretary of the Interior since 1891 that the fishing grounds were reserved as well as the uplands. *Id*. at 89-90. As Judge Torruella explained, the Supreme Court's approach leads to the similar conclusion here that Congress intended the "islands in the Penobscot River" to embrace the surrounding waters and riverbed.

Maine attempts (Response 11) to distinguish *Alaska Pacific Fisheries* based on its assertedly different "context and circumstances." Departing from the majority's myopic focus on a few words in MIA § 6203(8), Maine correctly appreciates that context is important in interpreting statutes. But it fails to distinguish *Alaska Pacific Fisheries* on this basis. Maine first points (Response 11) to Interior's understanding that the 1891 Metlakahtla reservation included the surrounding waters. But we demonstrated (U.S. Principal Brief 49-54) that Interior similarly understood that the Penobscot Reservation included the river. Maine next points (Response 11-12) to the 1916 presidential proclamation specifying that "the waters within 3,000 feet from the shore lines" were reserved for the Metlakahtlas. But the Ninth Circuit understood this proclamation to specify an area within the 1891 congressional reservation, *Alaska Pacific Fisheries v. United States*, 240 F. 274, 281 (9th Cir. 1917), and the Supreme Court did not

consider the proclamation relevant to its analysis of the 1891 statute as it did not even mention it.

Finally, Maine misses the mark (Response 12) in rehashing its merits brief argument that the Penobscots are not entitled to the same consideration as the Metlakahtlas because "[i]n 1980, the Main Stem did not have a fishery that would have been capable of sustaining the Nation in any way that resembled the 19th century circumstances of the Metlakahtlan Indians." As the United States explained (U.S. Response/Reply Brief at 13), that argument "unfairly attributes to Congress a stinginess that is belied by Congress's stated purpose 'to provide ... the Penobscot Nation ... with a fair and just settlement of their land claims,' MICSA § 1721(a)(7)." The on-reservation sustenance fishing right was a central benefit of the bargain for the Nation.

B. Maine v. Johnson

Judge Torruella explained (Op. 41-43, 57-59) that *Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007)—a dispute over authority under the Clean Water Act to regulate discharges from facilities into the Penobscot, St. Croix, and Piscatiquis Rivers—is significant because Maine acknowledged in that litigation that the Penobscot Reservation includes at least some part of the Penobscot River, *see supra* pp. 8-9, and this Court agreed. This Court first analyzed whether the Penobscot Nation and Passamaquoddy Tribe had jurisdiction over these discharges

under MIA § 6206(1), which provides for tribal jurisdiction over "internal tribal matters," and it concluded that they did not. 498 F.3d at 44-46. It also analyzed whether the tribes had jurisdiction under MICSA § 1724(h), which the Court read to govern management of the land that the Secretary of the Interior was to acquire in trust for the tribes under MIA § 6205 but not to apply to their reservations. 498 F.3d at 46-47. As Judge Torruella explained (Op. 58), the Court concluded in *Johnson* that § 1724(h) did not apply because the facilities in question discharged into the reservations.

Maine professes to be puzzled (Response 13) that anyone could think that "some of the boundary question was decided twelve years ago." Notably, however, Maine does not argue that Judge Torruella misunderstood Maine's own representations about the Penobscot Reservation in that case, which supported this Court's conclusion that the reservations included "waters *retained* by the tribes under the Settlement Act, based on earlier agreements between the tribes and Massachusetts and Maine." *Johnson*, 498 F.3d at 47.

III. Maine's Recently Enacted Statute Does Not Diminish the Need for *En Banc* Review.

The new Maine statute referenced in the Court's June 25, 2019 Order—"An Act to Protect Sustenance Fishing"—provides for the adoption of more stringent water-quality standards that take into account sustenance fishing, including for the Penobscot River, but it does not provide for any sustenance fishing rights. The

United States agrees with Maine's explanation of the statute's background, intent, effects, and limits. Response 13-16. The United States also agrees that the statute is "a positive development." Response 17.

The United States disagrees, however, with Maine's assertion (*id.*) that the statute "underscores that the Nation's sustenance fishing rights are not threatened" by the State's new position, accepted by the majority, that the Penobscot Reservation is limited to the island uplands. To the contrary, this progress toward a clean Penobscot River with a healthier fishery makes it all the more important to honor the Nation's legal rights to the River's resources promised in the treaties and Settlement Acts. This Court should reconsider the majority's decision that the Penobscot Reservation—where Penobscots have fished since time immemorial—entirely excludes the Penobscot River.

CONCLUSION

The United States' petition for rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with this Court's Order of June 25, 2019 and with the typeface requirements and type style requirements of Federal Rules of Appellate Procedure 32(c). This reply contains 3,900 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(f)).

s/ Mary Gabrielle Sprague

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2019, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate ECF system and that all participants in this case were served through that system.

s/ Mary Gabrielle Sprague